Original

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

COMMENTS OF J. GREGORY SIDAK

1. My name is J. Gregory Sidak. I am a Resident Scholar at the American Enterprise Institute for Public Policy Research (AEI) in Washington, D.C. and a Senior Lecturer at the Yale School of Management in New Haven, Connecticut. These comments are based on research that I have conducted for a book that I am writing on the regulation of foreign investment in telecommunications. They are filed in my individual capacity and are not made on behalf of AEI, Yale, or any other organization.

QUALIFICATIONS

2. In my scholarly research, in my public service as a lawyer and economist in the federal government, and in my consulting work and private law practice, I have studied issues of regulation and competition in telecommunications. I direct AEI's Studies in Telecommunications Deregulation, and at Yale I teach a graduate management course on telecommunications regulation with Professor Paul W. MacAvoy. I was formerly Deputy General Counsel of the Federal Communications Commission and, before that, Senior Counsel and Economist for the Council of Economic Advisers in the Executive Office of the President, where my work encompassed telecommunications regulation and antitrust policy. I am the co-author or editor of three books on regulated industries, including *Toward Competition in Local Telephony* (MIT Press & AEI Press 1994), written with Professor William J. Baumol, and the author of

more than twenty articles on antitrust, telecommunications regulation, constitutional law, administrative law, and related subjects in journals that include the *California Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Georgetown Law Journal*, *Harvard Journal on Law & Public Policy*, *Journal of Political Economy*, *New York University Law Review*, *Northwestern University Law Review*, *Southern California Law Review*, and *Yale Journal on Regulation*. My scholarly writings have been cited by the Supreme Court of the United States and lower federal courts, including the United States Court of Appeals for the D.C. Circuit. Within the past year, I have been a consultant on telecommunications matters to the Antitrust Division of the United States Department of Justice and the Canadian Bureau of Competition Policy. I received A.B. and A.M. degrees in economics and a J.D. from Stanford University, where I was a member of the *Stanford Law Review*, and I served as law clerk to Judge Richard A. Posner during his first term on the United States Court of Appeals for the Seventh Circuit.

THE FCC SHOULD CORRECT ITS MISINTERPRETATION OF SECTION 310(b)(4)

3. The most significant aspect of the Federal Communications Commission's interpretation of the foreign-ownership restrictions in the Communications Act is that the agency has ignored what the statute plainly says. Instead, the FCC interprets its authority under section 310(b)(4) in such a manner that the agency's putative power to waive these restrictions "in the public interest" now looms as a matter of central importance to structuring a foreigner's purchase of an investment interest in an American communications business. Section 310(b)(4) provides:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a federal government or representative thereof, or by any corporation organized under the laws of a foreign

> country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.[1]

Simply put, section 310(b)(4) allows foreign ownership of the holding company of a communications licensee to exceed 25 percent but gives the FCC the discretion to revoke or deny the grant of a license—"*if* the Commission finds that the public interest will be served by the refusal or revocation of such license."[2]

4. A treatise on international telecommunications regulation compiled by the Federal Communications Bar Association in 1993 reads the statute in this straightforward manner:

> Under the terms of the statute, the Commission must find that a *refusal* of the license to a company in which alien ownership in its holding company exceeds the twenty-five percent benchmark serves the public interest. Therefore, the onus is on the Commission to prove that the relaxed public interest standard mandates a refusal of the license request.[3]

This interpretation is the one most consistent not only with Congress' direct use of the English language, but also with a common sense approach to applying the public interest standard. Given the need that American telecommunications firms have to modernize their infrastructure and to forge the global alliances necessary to compete in the provision of full-service networks on an international scale, given the benefits that such investments and alliances would confer on American consumers, and given the likelihood that opening American telecommunications markets to greater foreign investment would more incline other nations to do likewise, there should be a very strong presumption that it would *disserve* the public interest for the FCC to refuse or revoke a license of a firm whose holding company is owned more than 25 percent by a citizen of any nation friendly to the United States. Put differently, it is difficult to hypothesize any legitimate, rational public purpose that would be served by discouraging investment by friendly foreigners in the American telecommunications industry.

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1. 47 U.S.C. § 301(b)(4).
2. *Id.* (emphasis added).
3. Tara Kalagher Giunta, *Foreign Participation in Telecommunications Projects, in* FEDERAL COMMUNICATIONS BAR ASSOCIATION, INTERNATIONAL PRACTICE COMMITTEE, INTERNATIONAL COMMUNICATIONS PRACTICE HANDBOOK, 1993 at 43, 46 (Paul J. Berman & Ellen K. Snyder eds. 1993) (emphasis in original).

5. The FCC's interpretation of section 310(b)(4) is exactly opposite that of the FCBA's treatise. The FCC regards its discretion under section 310(b)(4) to be broad—so broad as to authorize the agency to reverse Congress' presumption that foreign investment benefits the public interest. The FCC instead presumes foreign investment in an American holding company exceeding 25 percent to be unlawful, such that the applicant must prove to the FCC's satisfaction that the agency's grant of a waiver of that putative ceiling on foreign ownership would affirmatively serve the public interest in the applicant's particular case. In *PrimeMedia Broadcasting, Inc.*, the FCC stated in 1988 that "alien equity interests in a parent corporation . . . may only amount to 25%, *unless* the Commission finds that the public interest would be served."[4] And as recently as February 1995, when the FCC issued the NPRM in this docket, the agency failed to solicit any public comment on whether the discretion it claims in the enforcement of section 310(b)(4) had any basis in law. *"Under the plain language of the Communications Act* and its legislative history," the FCC instead asserted in the NPRM, "the Commission has broad discretion in applying Section 310(b)(4)."[5]

CONCLUSION

6. The FCC has created a presumption that foreign investment disserves the public interest if it exceeds 25 percent of the equity of an American radio licensee. That policy contradicts the plain language of section 310(b)(4) and thus violates sections 706(2)(A) and (C) of the Administrative Procedure Act. This rulemaking affords the FCC the perfect opportunity to correct its misinterpretation of the statute. If the FCC neglects that opportunity, any new rule or policy concerning foreign ownership that the Commission might hope to promulgate through this proceeding would be vulnerable to attack in court, for it would be a regulatory edifice built on a friable statutory foundation.

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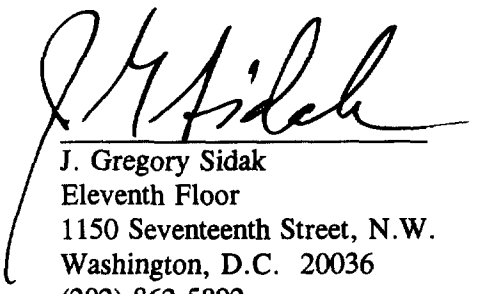
4. 3 F.C.C. Rcd. 4293, 4295 ¶ 12 (1988) (emphasis added).

5. Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking, IB Dkt. No. 95-22, ¶ 93 (released Feb. 17, 1995) (emphasis added).

7. The FCC can eliminate that risk in a number of ways. One way would be for the FCC to address the question of statutory interpretation on its own initiative in the report and order that will result from the current NPRM in this docket. A second way would be for the FCC to issue a supplemental NPRM soliciting comment on how the Commission should interpret section 310(b)(4). Parties affected by section 310(b)(4) are likely to be more candid about their views on this question of statutory interpretation if they can be aired in a rulemaking proceeding rather than in filings concerning a pending international transaction requiring the Commission's approval.

Respectfully submitted,



J. Gregory Sidak
Eleventh Floor
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5892